

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)
)
 Plaintiff,)
)
 vs.)
)
 FRANCIS ITIMAI,)
)
 Defendant.)
 _____)

CRIMINAL CASE NO. 2015-501

ORDER DENYING DISMISSAL

Ready E. Johnny
Acting Chief Justice

Hearing: August 3, 2015
Decided: August 21, 2015

APPEARANCES:

For the Plaintiff: April Dawn Skilling, Esq.
Secretary of Justice
Caroline A. Rugero, Esq. (argued)
Assistant Attorney General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941

For the Defendant: Marstella E. Jack, Esq.
P.O. Box 2210
Kolonia, Pohnpei FM 96941

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HEADNOTES

Criminal Law and Procedure – Motions

The Department of Justice’s involvement in the government’s relief efforts following Typhoon Maysak, which may have been the strongest typhoon to hit this area in the last 100 years, constitute excusable neglect for its delay in filing an opposition six days late. FSM v. Itimai, 20 FSM R. 131, 133 (Pon. 2015).

Criminal Law and Procedure – Motions

Failure to timely oppose a motion, even a motion to enlarge time, is generally deemed a consent to the motion. FSM v. Itimai, 20 FSM R. 131, 133 (Pon. 2015).

Criminal Law and Procedure – National Crimes

The FSM Supreme Court has exclusive jurisdiction over the prosecution of national crimes. FSM

v. Itimai, 20 FSM R. 131, 134 (Pon. 2015).

Criminal Law and Procedure – National Crimes

A national crime is statutorily defined as any crime which is inherently national in character and defined anywhere in Title 11, or otherwise a crime against the FSM. FSM v. Itimai, 20 FSM R. 131, 134 (Pon. 2015).

Criminal Law and Procedure – National Crimes

A crime is "inherently national in character" when the crime is committed by a national public official or public servant while that person is engaged in his or her official duties or in violation of a fiduciary duty or when the crime involves property belonging to the national government. FSM v. Itimai, 20 FSM R. 131, 134 (Pon. 2015).

Criminal Law and Procedure – National Crimes

When all of the acts and omissions a defendant is accused of committing, he did as a national government official or public servant while he was engaged in his official duty; when those acts may also be a violation of his fiduciary duty; and when national government property – \$926 in Maritime Operations Revolving Fund money – was involved, the information alleges national crimes. FSM v. Itimai, 20 FSM R. 131, 134 (Pon. 2015).

Criminal Law and Procedure – Dismissal: Criminal Law and Procedure – Sentencing

There is no authority that a crime is no longer a crime and the case must be dismissed once the accused has repaid all of the alleged financial losses, but, if the accused were found guilty, the repayment would likely have some effect on the degree of punishment. FSM v. Itimai, 20 FSM R. 131, 135 (Pon. 2015).

* * * *

COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

On August 3, 2015, the court heard the Defendant's Motion to Dismiss Information Filed March 27, 2015, filed April 6, 2015; Supplement to Defendant's Motion to Dismiss Information Filed March 27, 2015, filed April 21, 2015; and the government's Opposition to the Defendant's Motion to Dismiss Information and Motion for an Enlargement of Time to File an Opposition, filed May 7, 2015. The FSM's motion to enlarge time is granted and the defendant's motion to dismiss is denied. The reasons follow.

I.

Defendant Francis Itimai moves to dismiss the information charging him with conflict of interest, 11 F.S.M.C. 512; unsworn falsification to the authorities, 11 F.S.M.C. 524; witness tampering, 11 F.S.M.C. 526; theft, 11 F.S.M.C. 602; attempted theft, 11 F.S.M.C. 201 and 602; criminal mischief, 11 F.S.M.C. 603; and unauthorized possession or removal of property, 11 F.S.M.C. 604. He contends that the court does not have jurisdiction over these crimes because, in his view, everything that he has been charged with should, if prosecuted at all, be prosecuted in a state or municipal court. Itimai also contends that the information should be dismissed because the matter is moot, irrelevant, and immaterial. Lastly, Itimai argues that the prosecution's written opposition should be stricken because it was untimely filed.

II.

Itimai's motion to dismiss was filed and supposedly served by hand delivery on April 6, 2015, and his supplement to that motion was filed and supposedly served by hand delivery¹ on April 21, 2015, making May 1, 2015 (ten days later), the last possible date for the prosecution to timely file and serve a written response since the prosecution had ten days from date of service to respond to a motion if served personally. FSM Crim. R. 45(d) (ten days from date of service to respond to a motion).² The prosecution filed its opposition on May 7, 2015.

The prosecution included in its opposition, a motion to enlarge the time to file the opposition. The prosecution's response was delayed because of the Department of Justice's involvement in the government's relief efforts following Typhoon Maysak, which may have been the strongest typhoon to hit this area in the last 100 years. Itimai did not file a written opposition to the enlargement motion, although he did orally oppose the enlargement during the August 3, 2015 hearing. Failure to timely oppose a motion, even a motion to enlarge time, is generally deemed a consent to the motion. FSM Crim. R. 45(d).

The court concludes that the prosecution has shown excusable neglect for its delay. Furthermore, Itimai cannot show that he was prejudiced by an opposition filed six days late. Excusable neglect having been shown, the prosecution's motion to enlarge time to file its opposition is granted. FSM Crim. R. 45(b)(2). The opposition is deemed timely filed.

III.

Itimai contends that the crimes he is alleged to have committed are not national crimes and that therefore the court lacks jurisdiction to try him. He argues that, if they are crimes, they are matters that should be tried in a state or municipal court.

The information's factual allegations are that Itimai, who was then the FSM Secretary of Transportation, Communication and Infrastructure ("TC&I"), was on authorized travel to Yap to meet Asian Development Bank and Yap state officials about Yap omnibus projects. He sought to extend his travel authorization for additional time in Yap (May 1 to May 5, 2013) instead of returning to his post at Palikir in time for a special session of Congress. His extension request was denied and his continued travel in Yap was unauthorized.

Itimai then asked the Micronesian Shipping Commission ("MSC") to advance him the \$926 in travel funds that he would have been eligible for if his extended stay had been authorized. He told MSC that his travel authorization would be amended after he returned to Pohnpei and that MSC would be repaid when he received the travel funds for his extended stay from the FSM national government. He did not tell MSC that his request for an extended stay had been rejected. MSC paid \$926 into Itimai's personal account.

Once he returned to Pohnpei, Itimai went to MSC's office where he saw a world map on the

¹ The court says the papers were supposedly served by hand on the same date they were filed because the certificate of service for each filing is vague about when, where, or how the papers were served only states "I caused to be served . . . via hand delivery to the party's last known address" and then lists a post office box as the address where service was made.

² It would be sixteen days if the motion had been served by mail. FSM Crim. R. 45(e).

wall. He demanded it was his and took it. Itimai had an MSC employee prepare a \$926 invoice for the map, with the map to be put on the wall in his office for official TC&I use. Itimai then had a TC&I employee prepare a miscellaneous payment for \$926 to cover the invoice. The \$926 payment was made from the FSM's Maritime Operations Revolving Fund to MSC on November 13, 2013.

Itimai states that, on March 12, 2015, the FSM's Maritime Operations Revolving Fund was reimbursed the \$926 it had paid for the world wall map. The FSM filed this criminal case against Itimai on March 27, 2015.

IV.

Itimai contends that the FSM Supreme Court lacks jurisdiction over this case because it has no jurisdiction over MSC, an entity created by a treaty between three sovereign nations,³ and because, in his view, it was MSC's property that was allegedly stolen. Itimai thus concludes that the crimes alleged cannot be national crimes since, in his view, there is nothing inherently national in character about theft or criminal mischief. The court must reject Itimai's characterization of this case.

The statutes that Itimai is accused of violating are all part of the national criminal code. The FSM Supreme Court has exclusive jurisdiction over the prosecution of national crimes. FSM Const. art. XI, § 6(a) (court has exclusive jurisdiction when the national government is a party); 11 F.S.M.C. 103; FSM v. Albert, 1 FSM R. 14, 15 (Pon. 1981) (National Criminal Code places in the FSM Supreme Court exclusive jurisdiction over allegations of violations of the Code). A national crime is statutorily defined as "any crime which is (i) inherently national in character and defined anywhere in this title [Title 11]; or (ii) otherwise a crime against the Federated States of Micronesia." 11 F.S.M.C. 104(7)(a).

A crime is "inherently national in character" when any of the following is true:

...

(viii) the crime is committed by a national public official or public servant while that person is engaged in his or her official duties or in violation of a fiduciary duty;

(ix) the crime involves property belonging to the National Government

11 F.S.M.C. 104(7)(b).

All of the acts and omissions Itimai is accused of committing, he did as a national government official or public servant while he was engaged in his official duty. Itimai is alleged to have used his official position to obtain a travel advance from MSC and to have the TC&I Maritime Operations Revolving Fund use some of its funds to reimburse MSC or to pay MSC for the world wall map. Requisitioning \$926 from the Maritime Operations Revolving Fund, a fund dedicated to support the ongoing operation and maintenance of national government vessels, may also be a violation of the TC&I Secretary's fiduciary duty. The information thus alleges national crimes as defined by 11 F.S.M.C. 104(7)(b)(viii). Furthermore, because national government property – \$926 in Maritime Operations Revolving Fund money – was involved, jurisdiction is also proper under 11 F.S.M.C. 104(7)(b)(ix).

Accordingly, the FSM Supreme Court has jurisdiction over the crimes alleged in the information. Itimai's motion to dismiss for lack of jurisdiction is therefore denied.

³ Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

V.

Itimai also contends that this case should be dismissed because the matter is moot, irrelevant, and immaterial because there has been no loss of funds. Itimai argues that MSC had been repaid in full by November 13, 2013, for his travel advance, and, that while denying any wrongdoing and maintaining that the purchase of the map was proper, he used his own personal funds to reimburse the FSM's Maritime Operations Revolving Fund for the \$926 map payment on March 12, 2015.

The court must reject this contention. There is no authority that a crime is no longer a crime once the accused has repaid all of the alleged financial losses. The court cannot see how the March 12, 2015 reimbursement would affect Itimai's guilt or innocence, although, if Itimai were found guilty, it would likely have some effect on the degree of punishment.

VI.

Accordingly, Itimai's motion to dismiss is denied. A later court order will set a date for taking Itimai's plea, and if a not guilty plea is entered the trial will be scheduled to follow immediately thereafter.

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FSM SUPREME COURT TRIAL DIVISION

DRAKE WAINIT,)	CIVIL ACTION NO. 2014-1012
)	
Plaintiff,)	
)	
vs.)	
)	
CHUUK PUBLIC UTILITY CORPORATION,)	
)	
Defendant.)	
_____)	

ORDER DISMISSING CASE IN PART

Ready E. Johnny
Associate Justice

Decided: August 25, 2015

APPEARANCES:

For the Plaintiff:	Johnny Meippen, Esq. P.O. Box 705 Weno, Chuuk FM 96942
For the Defendant:	Erick B. Divinagracia, Esq. Ramp & Mida Law Firm P.O. Box 1480 Kolonia, Pohnpei FM 96941